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Supreme Court, U.S.
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No. 07- (1)

IN THE
# Supreme Court of the United States

THOMAS MICKENS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a habeas petitioner has been prejudiced by his trial attorney's decision to conceal the Government's plea offer from him, when there is a substantial difference between the sentence the petitioner would have received pursuant to the plea offer and the sentence he is now serving pursuant to his conviction after trial and the petitioner testified that he would have accepted the plea offer had he known about it.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

A Memorandum and Order of the United States District Court, Eastern District of New York, dated August 17, 2005, *Mickens v. United States*, 2005 WL 2038589 (E.D.N.Y.) (annexed as Appendix C), denied Petitioner's motion pursuant to F.R.C.P. Rule 60 for relief from a June 16, 1999, Order of the District Court dismissing Petitioner's 28 U.S.C. § 2255 petition challenging his 1989 judgment of conviction, *Mickens v. United States*, 53 F. Supp. 2d 326, 331 (E.D.N.Y. 1999). A Memorandum and Order of the District Court dated August 28, 2006, *Mickens v. United States*, 2006 WL 2505252 (E.D.N.Y.) (annexed as Appendix B), denied Petitioner's motion for reconsideration but granted Petitioner's application for a Certificate of Appealability on the issue of whether Petitioner sufficiently established prejudice resulting from his counsel's ineffectiveness. The Second Circuit Court of Appeals' Summary Order dated December 19, 2007, *Mickens v. United States*, 2007 WL 4462382 (2d Cir. 2007) (annexed as Appendix A), affirmed the Judgment of the District Court.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its Summary Order on December 19, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Sixth Amendment to the United States Constitution which provides, in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and . . . "to have the Assistance of Counsel for his defense."

## STATEMENT OF THE CASE

### 1. Background

In 1989, after a four-month jury trial before Hon. Thomas C. Platt, Petitioner, Thomas Mickens ("Petitioner") was found guilty of various counts of conspiracy, tax evasion, money laundering and other crimes.[1] Petitioner was sentenced to an aggregate term of imprisonment of thirty-five years, a fine of $1,000,000, and a special assessment of $800. The judgment of conviction was affirmed on Petitioner's direct appeal. *U.S. v. Mickens*, 926 F.2d 1323, 1325-1333 (2d Cir. 1991), *cert. den.*, *Mickens v. U.S.*, 502 U.S. 1060 (1992).

On April 23, 1997, Petitioner filed a petition pursuant to 28 U.S.C. § 2255 raising a Sixth Amendment claim of

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1. Petitioner was convicted of conspiracy to distribute and to possess with intent to distribute cocaine [21 U.S.C. § 846]; conspiracy to defraud the United States [18 U.S.C. § 371]; four counts of income tax evasion [26 U.S.C. § 7201]; one count of filing a perjurious income tax return [26 U.S.C. § 7206(1)]; eight counts of money laundering [18 U.S.C. §§ 1956(a)(1)(B)(i) & (ii)]; and, one count of structuring a financial transaction as part of a pattern of illegal activity [31 U.S.C. § 5324(3)].

ineffective assistance of his trial counsel, Robert M. Simels, Esq. Petitioner's then new attorney, Jonathan Shapiro, Esq., made several arguments concerning Simels' performance at trial, noting that the trial judge, himself, had characterized some of Simels' conduct as "egregious", "improper" and "insolent".[2] Shapiro also alerted the District Court to his, Shapiro's, suspicion that the Government may have conveyed a plea offer to Simels and, if so, that Simels failed to convey that offer to Petitioner. By Memorandum and Order dated June 16, 1999, the District Court dismissed the petition without a hearing. *Mickens v. United States*, 53 F. Supp. 2d 326, 331 (E.D.N.Y. 1999) Petitioner applied for a Certificate of Appealability which was denied by Memorandum and Order dated December 7, 1999.

**2. The Discovery of the Government's October 27, 1988, Plea Offer Letter and Petitioner's Rule 60 Motion**

In mid-November, 2002, Petitioner learned, for the first time, of an October 27, 1988, letter from AUSA Kirby A. Heller[3] "memorializ[ing] the plea offer communicated on October 27, 1988 to Robert Simels as lead counsel." The plea offer provided that if all defendants pleaded, the Government would accept from Petitioner a plea to Count 5 and the "equivalent of count

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2. Judge Platt also issued a Reference to the Committee on Grievances for Simels apparently "participat[ing] in concealing material evidence" and for having "made false statements of fact to the Court to obtain a favorable ruling permitting cross-examination."

3. Heller was the trial prosecutor on this case.

10 of the superceding information" in full satisfaction of the indictment. Ms. Heller's letter further stated that the plea offer was "subject to negotiation if the defendant want[ed] to cooperate with the government" and that the offer would expire on November 4 and not be reopened.

In June, 2004, Petitioner submitted a Rule 60 motion based on this newly discovered plea offer letter and by Memorandum and Order dated August 25, 2004, Judge Platt held that Petitioner was entitled to an evidentiary hearing "to determine whether Petitioner received ineffective assistance of counsel from Mr. Simels at the plea-bargaining stage of his case, if and when his attorney failed in his duty to communicate to his client a plea offer extended by the Government." *Mickens v. U.S.*, 333 F. Supp. 2d 44, 50 (E.D.N.Y. 2004).[4]

### 3. The First Decision on the Rule 60 Motion

In a Memorandum and Order dated August 17, 2005, the District Court stated that, after hearing all of the evidence, it could "reach only one conclusion: Simels received a plea offer from AUSA Heller and did not communicate it to Petitioner." *Mickens*, 2005 WL 2038589, at *3. Despite the fact that Simels "would have 'little to gain' and much to lose by concealing the plea offer from Petitioner," the District Court was "troubled" by Simels' "carefully vague" testimony and found

4. Judge Platt subsequently determined that he should not be the judge to preside over the hearing and the matter was transferred to Hon. Joanna Seybert who heard the parties' proof on April 18 and 19, 2005.

"evidence indicating that immediate pecuniary motives may have actually influenced Simels' decision-making." *Mickens*, 2005 WL 2038589, at *3-*5.[5] The District Court also found that the way Simels assisted Petitioner in executing a power of attorney in the name of an alias, "Thomas Harris", and then used that power of attorney to withdraw funds from a bank for his attorney fees, "raise[d] the specter that Simels may have been willing to compromise his ethical obligations in an effort to be paid." *Mickens*, 2005 WL 2038589, at *5.[6] Thus, the District Court found "that the Government extended a plea offer to Simels, but Simels, for some reason, failed to convey the offer to Petitioner" and that Petitioner

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5. Simels estimated his trial fees to be "maybe $10,000 a day". By concealing the plea offer from Petitioner, Simels was able to make it appear that Petitioner had no choice but to pay for a 4-month trial.

6. The undisputed record demonstrates that Simels engaged in the following unethical conduct to obtain approximately $1,000,000.00 in cash from Petitioner: (1) prior to trial, Simels prepared a Power of Attorney for Petitioner to sign using an alias, "Thomas Harris"; (2) Simels notarized that Power of Attorney to make it appear as though it had been executed by a "Thomas Harris" rather than by Petitioner, (3) Simels prepared and signed an affidavit falsely swearing that he had known "Thomas Harris . . . for a lengthy period of time" and that "Thomas Harris personally appeared before [him]" and "was not under any restraint", knowing that Petitioner was not "Thomas Harris" and that Petitioner was incarcerated at the time; (4) Simels prepared and caused the execution of the foregoing documents in order to obtain cash that Petitioner had placed in Mississippi safe deposit boxes under the alias, "Thomas Harris"; and (5) Simels carried out this scheme and did, in fact, remove the cash from the safe deposit boxes, knowing that Petitioner was being charged with money laundering.

has therefore "suffered a Sixth Amendment injury." *Mickens*, 2005 WL 2038589, at *5.[7]

Nevertheless, the District Court denied Petitioner any relief on the ground that Petitioner failed to demonstrate that he suffered any prejudice as a result of Simels' deficient, obviously unethical performance. *Mickens*, 2005 WL 2038589, at *6-*10. Even though, as the District Court found, there was a "significant", "undoubtedly substantial", disparity between the maximum sentence pursuant to the terms of the plea offer and the sentence Petitioner actually received, the District Court concluded that "[b]ecause of the global nature of the plea offer and the apparent disposition of certain of [the] Co-Defendants to proceed to trial, . . . [Petitioner] has failed to prove that he would have been able to accept the plea offer contained in the Plea Letter" and that "[s]uch finding is fatal to [Petitioner's] claims of prejudice . . ." *Mickens*, 2005 WL 2038589, at *8-10.

### 4. The Motion for Reconsideration and Application for a Certificate of Appealability

#### *Petitioner' Arguments in Support of Reconsideration and a COA*

On August 29, 2005, Petitioner moved for reconsideration arguing, *inter alia*, that his "Sixth Amendment injury" did more than simply deny him the opportunity to *accept* the Government's proffered plea

7. Although the District Court did not specifically identify what Simels' reason was for unethically concealing the plea offer from his client, there is only one reason appearing in the record: Simels' "pecuniary motive" to obtain "trial fees".

agreement; his injury also denied him the opportunity to *negotiate* a different plea agreement. Petitioner argued that the District Court overlooked the Second Circuit's holdings in *U.S. v. Williams*, 372 F.3d 178 (2d Cir. 2003), and *Mask v. McGinnis*, 233 F.3d 132 (2d Cir. 2000), and thus failed to apply the proper standard for determining prejudice when a criminal defendant is denied the opportunity to effectively negotiate against a plea offer. Petitioner maintained that he should not have the burden of proving that the Government's plea offer was not truly global. Instead, he should have to prove only that there was reasonable probability that he would have successfully negotiated a plea if he had been represented by an ethical attorney who, instead of concealing the Government's offer, assisted Petitioner in negotiating against that offer.

On reconsideration, the District Court agreed with Petitioner's factual argument "that the provisions of the global plea might not have been enforced" and that this "open[ed] the door for [Petitioner's] claim of prejudice" *Mickens*, 2006 WL 2505252 at *4. Nevertheless, the District Court rejected Petitioner's legal argument that he should not have to offer more than (1) the substantial disparity between the sentence offered and the sentence imposed and (2) his testimony that he would have accepted a plea offer. Instead, the District Court ventured to, "effectively, do the impossible", and "travel back in time and assess what [Petitioner] might have done" had Simels told him about the Government's plea offer. *Mickens*, 2006 WL 2505252 at *3. Despite the fact that "[n]o individual can explain with any *meaningful* degree of precision what would have happened" if Petitioner had an ethical lawyer to guide him through

the plea bargaining process, the District Court refused to credit Petitioner's claim that he would have accepted a plea. *Mickens*, 2006 WL 2505252 at *3 (emphasis added). Instead, the District Court speculated about what might have happened if Petitioner had an ethical attorney willing to negotiate on his behalf and, based on such speculation, "found" that Petitioner would not have accepted the Government's offer and therefore was not prejudiced by Simels' unethical conduct. The District Court did, however, grant a Certificate of Appealability on the issue of whether Petitioner sufficiently established prejudice resulting from his counsel's ineffectiveness. *Mickens*, 2006 WL 2505252 at *5.

**5. The Decision on Appeal**

By Summary Order dated December 19, 2007, the Court of Appeals affirmed the denial of the Rule 60 motion, finding that there was no reason to disturb the District Court's decision not to believe Petitioner's testimony that he would have accepted the plea agreement. The Court of Appeals also noted that "the plea agreement was a global offer dependent on all defendants electing to plead guilty, which two defendants refused to do" and that "the offer expired on November 8, 1988 and there was no indication that it was renewed." In light of these facts, the Court of Appeals concluded that Petitioner had "not demonstrated prejudice as a result of his counsel's failure to forward the agreement." *Mickens*, 2007 WL 4462382.

## REASONS FOR GRANTING THE PETITION

## PETITIONER ESTABLISHED PREJUDICE RESULTING FROM HIS COUNSEL'S INEFFECTIVENESS

### 1. The Prejudice Flowing From the Denial of Effective Advice During Plea Bargaining

It is well settled that "prior to trial an accused is entitled to rely upon his counsel to . . . offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (emphasis added); *see also Cullen v. United States*, 194 F.3d 401, 404 (2d Cir. 1999) ("there can be no doubt that counsel must always communicate to the defendant the terms of any plea bargain offered by the prosecution") Indeed, prior to *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996), counsel's duty to give his professional advice as to whether a plea offer should be accepted or rejected was "so well understood by lawyers practicing in [the Second Circuit] that the question ha[d] never been litigated." *Boria*, 99 F.3d at 496.[8]

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8. *See also* American Bar Association's Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992) ("A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable."), *quoted in Boria*, 99 F.3d at 496; Amsterdam, Anthony G., Trial Manual 5 for the Defense of Criminal Cases (1988) § 201 at 339 ("The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case."), *quoted in Boria*, 99 F.3d at 496-497.

Since *Boria*, it has been the law in the Second Circuit that where counsel conveys the prosecution's plea offer but fails to give advice as to the offer's implications, "a defendant suffers prejudice if there is a reasonable probability that his reliance on counsel's ineffective assistance affected the outcome of the proceedings." *Pham v. U.S.*, 317 F.3d 178, 182 (2d Cir. 2003), *citing United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998). Such "reasonable probability" is shown, even if the petitioner had insisted upon his innocence throughout his pretrial and trial proceedings, where, (1) in his post-conviction challenge the petitioner asserts, as Petitioner asserts here, that he would have accepted the plea offer and (2) there is a significant disparity, as here, between the sentence that would have been served if the plea offer had been accepted and the sentence the petitioner is now serving. This two-prong test, when met, satisfies the prejudice requirement because it clearly "undermine[s] confidence in the outcome of the proceedings." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Despite the fact that the proof against Petitioner was "compelling" (AUSA Heller) and there was no "reasonable chance of acquittal", *Boria*, 99 F.3d at 498, Simels never gave Petitioner any advice about whether he should accept the Government's offer. Indeed, in stark defiance (or ignorance) of *Von Moltke's* (and *Boria's*) clear mandate, Simels testified, "I never recommend that anybody particularly accept a plea offer, unless it is something that is just seemingly indicating that the Government had lost their mind."

But Simels not only chose to withhold his *advice* concerning the Government's offer, *he chose to withhold the fact that an offer had been made.* Thus, while it is obvious, as the District Court and Court of Appeals found, that Petitioner "suffered a Sixth Amendment injury," *Mickens*, 2005 WL 2038589, at *5, it is equally obvious that Petitioner suffered prejudice from this injury. If, in cases like *Boria*, a defendant's insistence upon his innocence, *even in the face of a plea offer*, is insufficient to negate his later claim that he would have accepted that offer had he been properly advised, then it is difficult to imagine what could possibly give a court "confidence" that Petitioner would not have accepted the Government's plea offer, had he been properly advised, when Petitioner *had never even been told about the offer.*

**2. The Prejudice Flowing From the Denial of the Opportunity to Engage in Plea Bargaining**

When an attorney fails to convey a plea offer, as Simels did in this case, the client suffers more than just a *Von Moltke* or *Boria* deprivation of the right to effective *advice* as to whether he should accept the offer. The client is also deprived of the opportunity to even *consider* the offer; *plea bargaining is not even an option.* Thus, the client is not just denied the right to make an *informed* choice; he is denied the right to make *any* choice *at all.*

Accordingly, where, as here, the Sixth Amendment injury arises from counsel's failure to *convey* a plea offer, the petitioner should not have the burden, as imposed by the courts below, of proving that, had he not been deprived of the opportunity to engage in plea

negotiations, he would have been able to obtain an offer that was acceptable to him. For such a burden not only undervalues the defense attorneys' function in the plea bargaining process, it requires courts to engage in pure speculation.

To prevent this sort of judicial speculation about whether a Petitioner would have successfully reached a plea bargain had he not been prevented by his attorney from entering into plea negotiations – which is precisely what the Courts did below – the burden must be placed upon the Government to negate the Petitioner's *prima facie* showing of prejudice with objective, non-self-serving evidence that plea negotiations by an effective and ethical attorney would not have made any difference. And there is absolutely no such evidence in this record.

Even assuming, as did the Courts below, that Petitioner would not have accepted the terms set forth in the Government's October 27, 1988, plea offer letter, there still is nothing in the record to give any Court "confidence", *Strickland*, 466 U.S. at 694, that an ethical and competent attorney would not have negotiated an offer with different terms that Petitioner would have accepted.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED DECEMBER 19, 2007

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 06-0140-pr

THOMAS MICKENS,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

Present BARRINGTON D. PARKER, RICHARD C. WESLEY, and DEBRA A. LIVINGSTON, Circuit Judges.

### SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the district court's opinion is AFFIRMED.

In 1989, Thomas Mickens was convicted in the United States District Court for the Eastern District of New York (Platt, *J.*) of, *inter alia*, various counts of conspiracy, tax evasion, and money laundering. He was sentenced to thirty-five years of imprisonment and his conviction was affirmed on appeal. *United States v.*

*Mickens*, 926 F.3d 1323 (2d Cir.1991). We assume the parties' familiarity with the underlying facts and procedural history of the case.

On April 23, 1997, Mickens filed a petition pursuant to 28 U.S.C. § 2255 claiming that his trial counsel, Robert Simels, was ineffective because he may have failed to convey a plea offer. Following the denial of his petition, Mickens made attempts to discern whether a plea agreement had indeed been offered. In November 2002, he received a copy of a draft plea agreement dated October 27, 1988 about which Simels had not informed him. In the agreement, Mickens was offered the opportunity to plead guilty to one count of a superseding indictment and one count of a superseding information. The agreement was conditional. It required all of the defendants to plead guilty, was "subject to negotiation if the defendant want[ed] to cooperate with the government," and expired on November 8. Not all of the defendants agreed to accept the plea agreement and it expired. Two defendants later pled guilty without plea agreements.

After discovering the draft plea agreement, Mickens submitted a motion under Fed.R.Crim.P. 60(b) seeking to vacate his prior conviction or, in the alternative, for reconsideration of the district court's denial of his habeas petition based on a renewed claim of ineffective assistance of counsel.

Judge Joanna Seybert, to whom the case had been reassigned, found, *inter alia*, that Simels' conduct in

receiving a plea offer from the government but failing to communicate it violated the first prong of the *Strickland v. Washington* test. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judge Seybert also found, however, that Mickens had failed to demonstrate prejudice (the second *Strickland* prong) because the plea agreement required all of the defendants to plead and two of the co-defendants decided to go to trial.

Mickens subsequently filed a motion for reconsideration which the district court denied. The court retreated from its prior position on the global plea due to evidence that the government had allowed two other defendants to plead guilty without agreements. Nonetheless, the district court did not credit Mickens' argument that he would have pled, pointing to his consistent assertions that he wished to go to trial and to the vigorous defense he mounted. The court also found significant a post-trial affidavit in which Mickens indicated substantial satisfaction with Simels' representation. The district court's findings of fact are reviewed for clear error. *United States v. Gordon*, 156 F.3d 376, 379 (2d Cir.1998). The court's conclusions of law are reviewed *de novo*. *Id.*

*Discussion*

A petitioner claiming ineffective assistance of counsel must show first that "counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and second, "that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Neither party contests that Mickens satisfied the first prong of the *Strickland* standard. This court has stated that "[a] defendant suffers a Sixth Amendment injury where his attorney fails to convey a plea offer. Defense counsel have a constitutional duty to give their clients professional advice on the crucial decision of whether to accept a plea offer from the government." *Pham v. United States*, 317 F.3d 178, 182 (2d Cir.2003) (emphasis removed). Further, "there is no dispute that failure to convey a plea offer is unreasonable performance." *Id.* at 183 (citing *Cullen v. United States*, 194 F.3d 401, 404 (2d Cir.1999) (emphasis omitted)). To establish prejudice, however, Mickens must show that there is a reasonable probability that absent Simels' errors, the outcome would have been different. The government maintains that Mickens has not established prejudice. We agree.

The district court, having the opportunity to assess Mickens' credibility, disbelieved his testimony that he would have accepted the plea agreement. We see no reason to disturb this conclusion. In addition, as noted, the plea agreement was a global offer dependent on all defendants electing to plead guilty, which two defendants refused to do. In any event, the offer expired on November 8, 1988 and there was no indication that it was renewed. In light of these facts, we believe that Mickens has not demonstrated prejudice as a result of

his counsel's failure to forward the agreement. We also find that the remainder of Mickens' contentions are without merit.

For all the foregoing reasons, the district court's opinion is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan, Wolfe,
Clerk of Court

By: s/ [illegible]

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK DATED AUGUST 28, 2006

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

No. 97-CV-2122 JS

THOMAS MICKENS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**MEMORANDUM & ORDER**

SEYBERT, District Judge.

**INTRODUCTION**

Petitioner Thomas Mickens ("Petitioner" or "Mickens") moves for reconsideration of this Court's Order dated August 17, 2005 ("August Order"). While Plaintiff's reconsideration motion was pending, Plaintiff filed a notice of appeal of the August 2005 Order to the Second Circuit Court of Appeals. In furtherance of the appeal, Plaintiff has requested that the Court issue him a Certificate of Appealability pursuant to 28 U.S.C. § 2253.

*Appendix B*

The Court refers the Parties' to the August Order for a recitation of all facts pertinent to the pending motions.

## DISCUSSION

### I. *The Effect Of The Pending Appeal*

In most cases, the timely filing of a notice of appeal divests the district court of jurisdiction over an action. *See Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 271 (2d Cir.1994). However, courts in this Circuit have recognized that, where an appellant files a notice of appeal after filing a motion for reconsideration pursuant to Local Rule 6.3, the appellate court's jurisdiction is suspended and the district court is free to decide the motion on the merits. *See Ricciuti v. New York City Transit Auth.*, 70 F.Supp.2d 300, 337-38 (S.D.N.Y.1999). The holding is supported by Federal Rule of Appellate Procedure 4(a), which provides that certain motions have the effect of staying the time for filing an appeal. *See* Fed. R.App. P. 4(a)(4); *Lowrance v. Achtyl*, 20 F.3d 529, 533 (2d Cir.1994) (recognizing that an appeal taken after a properly filed motion to alter or amend judgment pursuant to Rule 59 is a "nullity"). Accordingly, this Court is free to reach the merits of Petitioner's reconsideration motion.

*Appendix B*

## II. *Petitioner's Reconsideration Motion*

The standards controlling a motion for reconsideration are set forth in Local Civil Rule 6.3 and Rule 59(e) of the Federal Rules of Civil Procedure. A motion for reconsideration is appropriate when the moving party believes the Court overlooked important "matters or controlling decisions" that would have influenced the prior decision. *Shamis v. Ambassador Factors Corp.*, 187 F.R.D. 148, 151, (S.D.N.Y.1999). Reconsideration may only be granted when the Court did not evaluate decisions or data that might reasonably be expected to alter the conclusion reached by the court. *Wechsler v. Hunt Health Sys.*, 186 F.Supp.2d 402, 410 (S.D.N.Y.2002).

The Court finds no "controlling area of law" overlooked in the August Order. The Court adheres to its prior holding that "[w]here the plea offer is global, a defendant asserting prejudice from counsel's deficient representation with respect to the plea offer must either introduce objective facts indicating that the other co-defendants were inclined to accept the offer, or that the offer was not truly global." August Order at 2. The holding is divined from the principles espoused in *Pham v. U.S.*, 317 F.3d 178, 184 (2d Cir.2003), a case that expressly dealt with an undisclosed plea offer. Petitioner's reliance upon *U.S. v. Williams*, 372 F.3d 107 (2d Cir.2004) is unavailing where, as here, no finding of conflict was made. *See* August Order at 14.

*Appendix B*

Petitioner's factual objection provides more fertile ground for reconsideration. Petitioner argues that AUSA Kirby Heller's testimony at the Hearing contradicts this Court's finding that the Government unyieldingly enforced the terms of the global plea offer. Petitioner specifically relies upon Heller's testimony that the Government was interested in having Defendants Shelby Kearney and Bettina Celifie "out of the case" and having them serve as cooperators in the case against Petitioner and the other Defendants. (Tr. 71.)

In finding that the enforcement of the terms of the global plea precluded a finding of prejudice, this Court relied heavily upon the evident enforcement of the pleas unanimous terms against Co-Defendant Anthony Jacobs. At the Hearing, Jacobs' counsel testified that his client was interested in accepting the plea, but could not do so because not all Defendants would accept the global plea's terms. Because the global offer was the only one available to Jacobs, he eventually accepted responsibility for all charges against him in the Superseding Indictment. This Court reasoned that, because the global offer was the only offer made, and there was no indication that the Government would waiver from its unanimous terms, Petitioner could not demonstrate prejudice resulting from non-disclosure. Heller's statements concerning Kearney and Celifie compromise this finding; the testimony pointed out by Petitioner establishes that the provisions of the global plea might not have been enforced, and opens the door for Petitioner's claim of prejudice. *See Pham*, 317 F.3d at 184.

*Appendix B*

Petitioner has pointed to specific evidence that the Government might not have enforced the terms of the global plea, and established a significant sentence disparity. He maintains that he has, therefore discharged his prejudice burden under *Pham*. *See Pham*, 317 F.3d at 182 ("significant sentencing disparity in combination with defendants statement of his intention is sufficient to support a prejudice finding"). The Government argues that the Court still may reject Petitioner's ineffective assistance claim because his averment that he would have accepted a plea requiring him to serve approximately twenty years is not credible.[1]

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1. The Government also argues that Petitioner's claim must be dismissed because, due to his professed innocence, he could not have pled guilty to Count 5 (drug sale). But the determination that the global plea was not strictly enforced undercuts this argument. If the Government was willing to discuss modifications to the terms of the global plea, it certainly could have worked out an arrangement whereby Petitioner could plead to certain offenses that would subject him to a similar degree of punishment, but would not require him to perjure himself during allocution. In this regard it is important to point out the appropriate standard of review under *Strickland*. Petitioner need not prove with certainty that his attorney's deficient performance adversely affected the outcome; he need only demonstrate "a reasonable probability that . . . the result of the proceeding would have been different." *Strickland v. Washington*, 446 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *but cf. Pham v. United States*, No. 99-CV-11613, 2005 WL 3307060 at *12 (S.D.N.Y. Dec. 7, 2005) (no reasonable probability of acceptance where petitioner steadfastly maintained innocence with respect to one of the charges contained in the plea offer).

*Appendix B*

Purportedly non-credible, self-serving statements of plea acceptance are not unchartered territory in this Circuit. In *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir.1998) and *Pham*, the Second Circuit recognized that self-serving statements alone are insufficient to satisfy the prejudice prong of *Strickland*. *See Pham*, 317 F.3d at 182 ("It is true that our precedent requires some objective evidence other than defendant's assertions to establish prejudice"). The holdings require some objective evidence to legitimize a petitioner's claim. *Pham* explained that a "significant sentencing disparity" permits a finder of fact to "infer that defendants who profess their innocence still will consider a plea." *Id.* at 183. But *Pham* does not create a *per se* rule; other evidence may be considered in determining whether a petitioner has satisfied his burden under *Strickland*. *See* August Order at 8; *see also Cullen v. U.S.*, 194 F.3d 401, 407 (2d Cir.1999) (rejecting the Government's argument that protestations of innocence, at trial and thereafter preclude a finding of prejudice, but noting that "insistence on . . . innocence is a factor relevant to any conclusion as to whether [a petitioner] has shown a reasonable probability that he would have pled guilty.") For example, a petitioner during the relevant period may have been so outspoken and steadfast with respect to his resolve to go to trial that, notwithstanding a significant sentencing disparity, it would be improper to credit a later proffered declaration that he would have accepted a plea.

At the Hearing, Petitioner testified that he would have accepted an offer requiring him to plead guilty to

Counts 5 and 10 of the Superseding Indictment. (Tr. at 233.) He understood these Counts to relate to the distribution of drugs and tax evasion. (*Id.* at 233, 295-96.) Petitioner believed that he would have been subject to a sentence between five and ten years if he pled guilty to these counts. (*Id.* at 294-96.)

As determined in the Court's August Order, however, drug distribution and tax evasion were not the charges offered in the plea letter. This Court adopted the testimony of AUSA Heller and found that the two charges pertained to a drug sale and money laundering—exposing Petitioner to statutory maximum sentences totaling forty years. Perceiving that the plea letter might have referred to these charges, the Government questioned Petitioner about his willingness to accept a plea of a lengthier duration than 10 years. In response, Plaintiff eventually testified that he would have accepted a plea of up to thirty-five years—the sentence that he actually received from Judge Thomas C. Platt. (*Id.* at 296.)

Petitioner stated that he would have accepted a plea of lengthier duration because he wanted to save his acquaintances from punishment and because he was guilty of "the money laundering and tax evasion charges" (Counts 7-21) contained in the Superseding Indictment. (*Id.* at 233.) He still maintained his innocence with respect to the "drug charges" (Counts 1, 4 and 5). (*See Id.* at 273-74, 309.) Petitioner's claims that he was guilty of the money laundering charges yet innocent of the drug conspiracy charge (Count 1) are in tension with

one another, but are not totally inconsistent. Petitioner admitted that he participated in a conspiracy to distribute drugs, but claimed that no conspiracy existed during the period (July 1987-May 1988) set forth in the Superseding Indictment. (Tr. at 273-74.) With respect to the specific drug sale charges (Counts 4 and 5) Petitioner asserts that he did not participate in those specific transactions. Notably, the jury acquitted Petitioner of those Counts.

The Government argues that Petitioner's conduct during the relevant period belies any desire to accept a plea. The Government relies upon Petitioner's persistent claims of innocence, efforts to dissuade co-defendants from implicating him in the drug conspiracy, and expenditure of massive funds on a trial defense. Based upon Petitioner's demonstrated ability to proffer false representations, the Court agrees with the Government.

Cases such as this require a district court to, effectively, do the impossible. A court must attempt to travel back in time and assess what a particular defendant might have done under certain circumstances. A defendant's conduct is not the only variable in these cases. As aptly pointed out by Petitioner, where a defendant is not made aware of a plea, he not only loses the ability to accept its terms, but his ability to further negotiate is compromised. No individual can explain with any meaningful degree of precision what would have happened.

But cases such as *Pham* make clear that a showing of prejudice is still required. District courts must look to objective criteria and facts that legitimize a Petitioner's claim that he would have accepted a plea. *Pham* permits a substantial disparity between the plea offer and the sentence received to serve as an objective, corroborating fact, but *Pham* does not mandate a finding of prejudice in all such cases. A district court is still required to assess all of the evidence when determining whether a petitioner has sustained his burden.

As indicated in the August Order, Petitioner is hardly a bastion of credibility. He has manifested an utter disregard for the truth so long as it serves his purposes. At trial, Petitioner put forth a vigorous defense to all charges; only at this late juncture has Petitioner elected to profess his guilt to the significant money laundering charges that were levied against him. Such admitted guilt would typically be considered probative of whether he would have accepted a plea. If he was certain that the Government would, as it did, obtain convictions with respect to all of the money laundering charges, reason would dictate that he would be inclined to accept a plea.

However, the Court is apprehensive to credit such late in the day contrition. At trial, Petitioner presented an extensive and elaborate defense to the money laundering charges. He claimed that the funds alleged to be laundered were not the result of a drug conspiracy; rather, the money was received from Petitioner's deceased father, who ran a gambling business. Petitioner continues to insist upon his innocence to Count 1 (drug

distribution conspiracy), conveniently contending that any conspiracy existed only during times outside those set forth in the Superseding Indictment. The position stands in obvious tension with his trial claim of an alternative source of the laundered funds.

At the Hearing, Petitioner refuted the contents of an affidavit that he signed and submitted to Judge Platt in connection with a post-trial motion. In the affidavit, Petitioner provided a glowing review of Simels' performance as his trial counsel. The statements stood in stark contrast to Petitioner's testimony at the Hearing that he was manipulated and intimidated by Simels. In explaining why he signed the affidavit despite its false contents, Petitioner testified that he did so because Simels informed him that it would be in his "best interest." (Tr. at 228.) Indeed, rather than establish any consistent story with respect to admitted guilt or innocence that would allow the Court to assess the legitimacy of Plaintiff's claims that he would have accepted a plea, the foregoing facts establish that Petitioner is savvy and will say just about anything that will serve his purposes. Accordingly, the Court accords little probative value to Petitioner's proffer that his admitted guilt rendered him amenable to accepting a plea.

The disparity in sentences also ostensibly legitimizes Petitioner's claim. The Court finds, however, that in this case, the disparity is insufficient to carry Petitioner's burden. The Court reaches this conclusion for several reasons. First, the disparity between the sentence

received and the sentence under the plea is not so immense as to *de facto* legitimize Petitioner's claim. The sentence under the plea was approximately twenty years, while the sentence Petitioner actually received was thirty-five years. While the disparity between the two sentences is substantial, the sentence pursuant to the plea is substantial in its own right. This was not a "no brainer" deal that, objectively, any defendant in Petitioner's position would accept. This mitigates the disparity's probative value as an objective, corroborating factor. Second, during the Hearing, it was clear that Petitioner's primary motivation for accepting a plea was his desire to protect his acquaintances from punishment. Petitioner submitted no evidence that his plea, in any way, would have achieved this goal. Deprived of his primary reason for accepting a plea, the Court fails to see why Petitioner would have accepted the offer. Petitioner also claimed that he would have accepted the plea because he was guilty of the money laundering and tax charges. As explained above, the Court attributes little probative value to Petitioner's recent acknowledgment of guilt—particularly where he presented such an elaborate defense at trial, has already been convicted and, thus, has nothing to lose by making such a claim.

Finally, the Court relies upon Simels' testimony that Petitioner informed him that he was not interested in accepting a plea. (Tr. at 154, 187-88.) While the Court's reliance upon the statements of Simels in this context might strike the Parties as peculiar, his testimony on this topic, quite frankly, is the only testimony that makes

sense in light of all the evidence adduced at the Hearing. The fact that Petitioner was not interested in accepting any plea explains (but certainly does not excuse) Simels' failure to convey the offer. Moreover, Petitioner's unwillingness to accept a deal explains why he never uncovered the existence of the global plea offer after hearing Defendants Jenkins and Jacobs discussing their respective offers while in the bullpen.

For all of the foregoing reasons, the Court rejects Petitioner's assertion that he would have accepted a plea, and therefore rejects Petitioner's claim of prejudice.

## III. *Petitioner's Request For A Certificate Of Appealability*

Petitioner requests that this Court issue a certificate of appealabilty. A certificate of appealability should only be issued where the Petitioner has made a "substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Because the Court has determined that Petitioner sustained a Sixth Amendment injury, the request for a certificate of appealability is GRANTED on the issue of whether Petitioner sufficiently established prejudice resulting from his counsel's ineffective assistance.

*Appendix B*

## CONCLUSION

For the reasons explained above, Petitioner's motion for reconsideration is DENIED. Petitioner's request for a certificate of appealability is GRANTED.

SO ORDERED

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
August 28, 2006

## APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AUGUST 17, 2005

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

97-CV-2122 (JS)

THOMAS MICKENS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

**MEMORANDUM & ORDER**

SEYBERT, District Judge.

Petitioner Thomas Mickens ("Petitioner" or "Mickens") moves, pursuant to Federal Rule of Civil Procedure 60(b), to vacate his prior conviction or, in the alternative, for relief from Judge Thomas C. Platt's denial of his habeas petition. For the reasons set forth below, Petitioner's motion is DENIED.

*Appendix C*

## BACKGROUND

Petitioner Thomas Mickens was the orchestrator of a cocaine distribution conspiracy originating in Queens, New York during the mid-late 1980s. In 1989, after a four month trial, Mickens was convicted of sixteen counts, including conspiracy to distribute cocaine, money laundering, tax evasion and illegal structuring of transactions. (R. at 327.) Petitioner was tried with three other Co-Defendants: (1) Shelby Kearney ("Kearney"); (2) Norvell Young ("Young"); and (3) Bettina Celifie ("Celifie"). Only Defendant Young was acquitted of all charges.

Petitioner was sentenced to 35 years imprisonment and ordered to pay a fine of $1 million and a special assessment of $800. His conviction was affirmed by the Second Circuit, *see U.S. v. Mickens*, 926 F.2d 1323 (2d Cir.1991) (*"Mickens I"*), and the Supreme Court denied certiorari. *See Mickens v. U.S.*, 502 U.S. 1060, 112 S.Ct. 940, 117 L.Ed.2d 111 (1992).

Approximately five years later, Mickens filed a petition for a writ of habeas corpus ("Petition") pursuant to 28 U.S.C. § 2255. Initially, the Petition was dismissed on procedural grounds. The Second Circuit reversed the district court's determination, reinstated the Petition and remanded the matter back to the district court for further proceedings. *U.S. v. Mickens*, 148 F.3d 145 (2d Cir.1998) (*"Mickens II"*). After remand, the Petition was dismissed for failure to allege the deprivation of any constitutional right. *See Mickens v. U.S.*, 53 F.Supp.2d

326 (E.D.N.Y.1999) (*"Mickens III"*). Petitioner's request for a certificate of appealability was denied by both the district court and the Second Circuit.

In September 2003, Petitioner filed the instant motion, pursuant to Rule 60(b), seeking to vacate his prior conviction or, in the alternative, for reconsideration of the district court's denial of his habeas petition. The basis of Petitioner's motion is his belief that Mr. Robert Simels ("Simels"), the attorney who represented Petitioner at the criminal trial, received a plea offer from Assistant United States Attorney Kirby Heller ("AUSA Heller"), yet failed to convey the offer to Petitioner. This argument was raised in Petitioner's original habeas application and his request for a certificate of appealability, but was rejected because Petitioner did not possess any evidence indicating that such a plea offer had been made. At the time, Simels' position was that he did not receive a plea offer from the Government, and the Government was unable to locate any evidence of a plea offer having been extended to Petitioner.

The impetus for the Rule 60(b) motion was the discovery of an October 27, 1988 letter ("Plea Letter") from AUSA Heller to all defense counsel, memorializing a "global plea" offer extended to Petitioner and Defendants Kearney, Young, Celifie, George Jenkins and Anthony Jacobs. (Gov't's Ex. 10.)[1] The Plea Letter detailed the specific counts of the Superseding Indictment to which each Defendant would accept a plea

1. Defendants Jenkins and Jacobs avoided trial by pleading guilty to all charges against them in the Superseding Indictment.

and established an acceptance deadline of November 4, 1988. (*Id.*) Because the plea offer was "global," the Defendants had to accept the offer unanimously, or not at all.[2]

Based on the newly discovered Plea Letter, Judge Platt, in an Order dated August 25, 2004, granted Petitioner an evidentiary hearing pursuant to Rule 60(b). *See Mickens v. U.S.*, 333 F.Supp.2d 44, 48-49 (E.D.N.Y. 2004) ("*Mickens IV*").[3] The purpose of the hearing was "to determine whether [Petitioner] received ineffective assistance of counsel from Mr. Simels at the plea-bargaining stage of his case, if and when his attorney failed in his duty to communicate to his client a plea offer extended by the Government." *Id.* at 50.

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2. After numerous Freedom of Information Act ("FOIA") requests, the Plea Letter was discovered by Petitioner's friend, Donna Ruff. (*See* Pet'r's Ex. H; Tr. at 196-201.) Little has been proffered to explain why the letter eluded the Government's (and the Petitioner's) discovery for so long. The letter was docketed as part of the original record in the criminal case, so it was attainable by all. The only explanation for the delayed discovery was aptly pointed out by Petitioner's counsel on the initial habeas application: the placement of such correspondence on the criminal docket is highly unusual—so unusual that he did not even think to look there. (Tr. at 104-05.)

3. In the August 2004 Order, Judge Platt explained that the Rule 60(b) motion was not precluded by the rule against successive habeas petitions because it related to the integrity of the § 2255 proceeding, not Petitioner's criminal conviction. *See Mickens IV*, 333 F.Supp.2d at 48-49; *see also Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480, 2005 WL 1469516 at * *4-6 (June 23, 2005); *Harris v. U.S.*, 367 F.3d 74, 77 (2d Cir.2004).

*Appendix C*

The evidentiary hearing ("Hearing") was conducted by this Court[4] on April 18-19, 2005. The Court received testimony from the following witnesses: (1) Petitioner; (2) Petitioner's brother, Frank Mickens; (3) Simels; (4) AUSA Heller; (5) Donna Ruff; (6) Ronald Rubinstein, attorney for Defendant Jacobs; (7) Jonathan Shapiro, Petitioner's counsel with respect to the initial habeas application; and (8) John Pollok, Petitioner's counsel on appeal from the judgment of conviction.

## DISCUSSION

### I. *Standard of Review*[5]

#### A. *Rule 60(b)*

Petitioner's 60(b) motion is most accurately characterized as an application for relief from a prior order based on newly-discovered evidence. *See Mickens IV*, 333 F.Supp.2d at 48 n. 3; Fed.R.Civ.P. 60(b)(2). In order to set aside a prior order pursuant to Rule 60(b)(2), the movant must demonstrate that: "(1) the newly discovered

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4. Due to the acrimonious relationship between Judge Platt and Simels that developed during Petitioner's criminal trial, Judge Platt recused himself from this matter. The matter was then reassigned to this Court.

5. Because Judge Platt concluded that Petitioner's 60(b) motion was permissibly filed as an attack on the integrity of the prior habeas proceeding, *see supra* n. 3, the Court is constrained to review the application only as a motion for reconsideration of the denial of the habeas petition (rather than, as Petitioner requests, a Rule 60(b) motion to vacate his prior conviction).

evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant . . . [was] justifiably ignorant of [such facts] despite due diligence, (3) the evidence [is] admissible and of such importance that it probably would . . . change[ ] the outcome, and (4) the evidence [is] not . . . merely cumulative or impeaching." *U.S. v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir.2001) (quoting *U.S. v. Int'l Bhd. of Teamsters*, 179 F.R.D. 444, 447 (S.D.N.Y.1998)).

The only issue before this Court is whether the Plea Letter, in connection with the other evidence adduced at the Hearing, alters the prior determination concerning Petitioner's Sixth Amendment ineffective assistance of counsel claim.

**B.** ***Ineffective Assistance Of Counsel***

A "[d]efendant suffers a Sixth Amendment violation when he receives ineffective assistance of counsel." *Pham v. U.S.*, 317 F.3d 178, 182 (2d Cir.2003). In order to prevail on his ineffective assistance claim, the Petitioner must establish that "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 446 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

It is well established that "a defendant suffers a Sixth Amendment injury where his attorney fails to

convey a plea offer." *Pham*, 317 F.3d at 182. However, the failure to communicate a plea offer, by itself, does not warrant a finding of ineffective assistance. Proof of failure to communicate a plea offer only satisfies the first prong of the *Strickland* test.

In order to satisfy the prejudice prong of *Strickland*, a defendant alleging an uncommunicated settlement offer must establish, through some objective evidence, that if they had received the plea offer, they would have accepted it. *See Muyet v. U.S.*, No. 01-CV-9371, 2004 WL 1746369 at *8 (S.D.N.Y. Aug. 3, 2004). A defendant, therefore, may not rely simply upon his own "self-serving statements" that he would have accepted the plea offer. *Pham*, 317 F.3d at 182.

Objective factors that tend to corroborate or refute whether a defendant would have accepted a plea offer include the defendant's continued protestations of innocence, and the disparity between the maximum sentence under the plea offer and the sentence received after trial. *See Pham*, 317 F.3d at 182 (recognizing sentencing disparity as an objective factor to be used to corroborate whether a defendant would have accepted a plea); *U.S. v. Perez Gomez*, No. 98-CV-109, 2003 WL 22119123 at *6 (D.Conn. Aug. 29, 2003) (recognizing that protestations of innocence are probative of acceptance of a plea). With respect to sentencing disparities, the Second Circuit has noted that "a significant sentencing disparity in combination with defendant's statement of his intention is sufficient to support a prejudice finding." *Pham*, 317 F.3d at 182. But this does not present an

absolute rule. Where other objective factors indicate that acceptance was not likely or impossible, a defendant's prejudice claim may still fail. *See Perez Gomez*, 2003 WL 22119123 at *6 (recognizing that other objective factors may outweigh a significant sentencing disparity, requiring a finding that a defendant would not accept a plea offer).

## II. *Analysis*

Petitioner contends that he has satisfied the *Strickland* criteria because the Government extended a plea offer to Simels, the offer was never conveyed to Petitioner, and Petitioner would have accepted the plea offer had he been aware of its existences. According to Petitioner, Simels did not inform him of the plea offer because Simels wished to amass enormous legal fees during trial.

The Government argues that Petitioner has failed to satisfy either of the two *Strickland* criteria because: (1) Petitioner cannot demonstrate that Simels failed to convey any plea offers extended by the Government; and (2) even if Simels failed to convey a plea offer to Petitioner, Petitioner cannot establish that he would have accepted it. The Court considers each argument in turn.

*Appendix C*

## A. *Simels' Failure To Communicate The Plea Offer*

Based upon the record of Petitioner's § 2255 Petition and the evidence adduced at the Hearing, the Court can reach only one conclusion: Simels received a plea offer from AUSA Heller and did not communicate it to Petitioner.

As explained in the credible testimony of Jonathan Shapiro ("Shapiro," Petitioner's original habeas counsel), prior to the discovery of the Plea Letter, Simels' position was that he never received any plea offer with respect to Petitioner. (*See* Pet.'s Ex. F; Tr. at 101-03); *see also Mickens IV*, 333 F.Supp.2d at 45. At the Hearing, however, Simels' position was more qualified: he denied *any recollection* as to whether a plea offer had been extended to Petitioner. (Tr. at 126-27.) Simels added that "I convey all plea offers to all clients made by the government." (*Id.* at 129; *see also Id.* at 150-51.) The testimony, which may be fairly characterized as carefully vague, permitted an inference that, if a plea offer was extended, Simels would have conveyed it to Petitioner.

In contrast to Simels' memory of the plea offer, his recollection for other details at the Hearing was rather sharp. For example, while Simels was unable to recall any plea offer being extended to his client, his recollection of a conversation concerning Petitioner's purported desire to accept a plea was quite specific—Simels testified that such a conversation never took place. (Tr. at 128.) Further, despite testifying that he was

unable to recall how much he earned from representing Petitioner, or the manner in which he was paid (*Id.* at 134-35, 182), Simels had particularized recollections with respect to the payment scheme for John Pollok, Petitioner's appellate attorney. (*Id.* at 180-81, 183.) Specifically, Simels testified that he had listened to Pollok's testimony about his fee arrangement with Petitioner, and that Pollok's recollection of the facts was "faulty to say the least." (*Id.* at 181.)

Based upon Simels' vague testimony concerning the existence of a plea offer, and considering the other testimony and evidence adduced at the Hearing, the Court finds credible Petitioner's assertion that Simels never advised him of the global plea offer. In reaching this conclusion, the Court rejects the Government's multiple, appealing arguments as to why Simels would never have withheld a plea offer from Petitioner.

The Government points out that Simels, as a high profile criminal defense attorney, would have "little to gain" and much to lose by concealing the plea offer from Petitioner. Doubtless, Petitioner was one of Simels' most high profile clients. If news had spread that Simels was keeping plea offers from Petitioner, it would certainly have a meaningful, negative impact on Simels' lucrative defense business. Thus, Simels had a lot to lose if this conduct was discovered. In addition, the plea offer was global and was communicated to all other Defendants, rendering it quite possible that Simels' alleged concealment of the offer would be detected. The Government notes that certain of Petitioner's Co-

Defendants, Jacobs and Jenkins, were desirous of accepting a plea and could have exposed Simels' actions to Petitioner. When these circumstances are juxtaposed with the short-term benefit of the trial fees Simels ostensibly envisioned when he opted to conceal the plea agreement, the Government's position is quite alluring.

The argument, however, is short on facts. The Government's conjecture as to Simels' plausible motivations (or lack thereof) does not remedy Simels' inability to testify with any precision concerning the plea offer. The Court is troubled by Simels' amended position with respect to whether a plea offer was extended or not. Specifically, the Court fails to see why, if Simels (as he testified to at the Hearing) was uncertain or did not recall whether any plea offer was extended to Petitioner, he would represent to Shapiro, affirmatively, that no such offer was ever made. When Simels was given an opportunity to explain his statements to Shapiro, he simply averred that he could not recall the conversation. (Tr. at 182-83.) In light of the foregoing, the Court places little reliance upon Simels' averment that if he received any offer, he would have conveyed it to Petitioner.

In contrast, Petitioner has not wavered from his insistence that he never received notice of the plea offer from Simels. (Tr. at 269.) The Court does not intend to depict Petitioner as a bastion of credibility, but the Government does little to impeach his veracity on this point. Rather, the majority of the Government's attacks on Petitioner's credibility concern separate issues: whether Petitioner assiduously sought to take a plea, and

whether Petitioner was truly at the mercy of Simels' manipulation and decision-making throughout the representation. But neither fact impacts Petitioner's credibility concerning his ignorance of the plea offer—and such facts certainly have no bearing upon Simels' duty to disclose the plea offer. The decision to accept a plea offer is "ordinarily the most important single decision in any criminal case," *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir.1996), and counsel's candor with the defendant in this context is imperative.

Finally, there is evidence indicating that immediate pecuniary motives may have actually influenced Simels' decision-making. Two particular events, when viewed together, are noteworthy. First, Simels assisted Petitioner in executing a power of attorney in the name of an alias, "Thomas Harris," in favor of his brother Frank Mickens. (Tr. at 188-90.) The power of attorney permitted Frank Mickens access to two safety boxes located at Trustmark National Bank in Jackson, Mississippi. (Ex. 13, 14.) In connection with the execution of the power of attorney, Simels signed an affidavit stating that he knew the man before him signing the power of attorney to be "Thomas Harris." (Ex. 13; Tr. at 188-190, 218.) Simels, however, testified at the Hearing that he knew the true identity of the man who signed the document to be Thomas Mickens but he was aware that "Thomas Harris" was one of Petitioner's aliases. (Tr. at 188-90.)

This conduct, standing alone, would not permit any meaningful inference of a suspect pecuniary motive.

However, when viewed within the context of Simels' subsequent trip to Jackson, Mississippi, the conduct becomes more troubling. At the Hearing, the Court heard testimony concerning a trip that Mr. Simels took to Jackson in late 1988/early 1989. (Tr. at 116-18, 136-38, 175-77.) During the trip, Simels met with Petitioner's brother, Frank Mickens. It is clear that one of the reasons for the trip was to collect funds to pay Simels' fees. (Tr. at 138, 140, 175-76.) Further, it is apparent that some of the funds were retrieved from safety deposit boxes located at Trustmark National Bank—the subjects of the Power of Attorney executed by Simels. (Tr. at 90, 137, 175-76, 177, 188-90; R. at 369-70.) The two events, when viewed together, raise the specter that Simels may have been willing to compromise his ethical obligations in an effort to be paid.[6]

Based on the foregoing, the Court finds that the Government extended a plea offer to Simels, but Simels, for some reason, failed to convey the offer to Petitioner. Accordingly, Petitioner has suffered a Sixth Amendment injury. *See Pham*, 317 F.3d at 182. The Court now

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6. After the trial, Judge Platt referred Simels to the Eastern District's Grievance Committee and, pending the Committee's determination, suspended Simels from practicing in his Court. (R. at 366-73.) The Grievance Committee Referral cited numerous potential bases for disciplining Simels; among these was Simels' alleged involvement in the removal of funds from the Trustmark National Bank safe deposit boxes. The Referral noted that the funds contained in the safety deposit boxes were allegedly hidden proceeds gained from drug distribution. (R. at 369.)

examines whether Petitioner suffered any prejudice as a result of Simels' deficient performance.

### B. *Whether Petitioner Would Have Accepted The Plea Offer*

Not surprisingly, Petitioner asserts that, had he been aware of the global plea offer, he would have accepted it. (Tr. at 233-34.) Petitioner relies upon this assertion and the disparity in length between the sentence he received and the guidelines sentence that would have been imposed under the global plea agreement in order to establish prejudice. *See Pham*, 317 F.3d at 182.

The Government advances numerous reasons why Petitioner is unable to establish prejudice. First, the Government contends that Petitioner cannot establish a disparity in length between the plea offer sentence and the actual sentence because the nature of the second count offered in the Plea Letter is unclear. Second, the Government posits that, due to the global nature of the plea agreement, even if Petitioner wanted to, he could not have accepted the plea offer. Third, the Government asserts that Petitioner's assertions that he would have accepted the plea offer are disingenuous. Finally, the Government argues that Petitioner, based upon his own admissions at the Hearing, could not have accepted the plea offer because it would have required him to commit perjury before a federal district judge.

*Appendix C*

## 1. *Ambiguities In The Plea Letter*

The Plea Letter provides, in pertinent part, that in order to accept his portion of the global plea offer, Petitioner would have to accept a plea on two counts—Count "5, [and the] equivalent of [C]ount 10 in superseding information." Count 5 charges that, on March 11, 1998 Petitioner "and George Jenkins did knowingly and intentionally distribute cocaine, a Schedule II narcotic drug controlled substance." (Gov't's Exs. 2-4 at 3.) The specifics of the second count are unclear. No Superseding Information was filed in the criminal action, and AUSA Heller testified that she has no recollection as to what the second count refers to. (Tr. at 79.)

The Government contends that the inability to precisely define the second count renders Petitioner incapable of establishing any objective disparity between the plea offer sentence and the sentence imposed. According to the Government, because Petitioner bears the burden of establishing the objective facts indicating that he would have accepted the plea offer, his motion must fail.

As structurally sound as the Government's argument may be, the Court refuses to force Petitioner to shoulder the burden for the Government's shortcomings. The pertinent facts concerning the plea offer have, at all times, been within the Government's control. Until recently, the Government erroneously denied the plea offer's existence, and now attempts to compound its prior

error by relying upon the ambiguities in the Plea Letter and the stale recollections of AUSA Heller to defeat Petitioner's claim. Adherence to the Government's position on this issue would reward sloppy drafting and inadequate record-keeping, and the Court will not do so.

The Government's failings, however, do not provide Petitioner with an opportunity to simply pick a charge out of thin air. There must be some reliable indicia as to the nature of the second count. Here, Petitioner requests that the Court construe the second count to be the same as the "Count 10" contained in each of the three Superseding Indictments that the Government filed in the criminal action: a 1997 tax evasion charge. (*See* Exs. 2-4.)

But a review of the objective facts renders this position less than reliable. Petitioner was, indisputably, the orchestrator of the criminal conduct referenced in the Superseding Indictment; he was the first-named defendant, and the primary target of the twenty-three charges contained therein. It strains credulity to believe that Petitioner's plea offer would be as favorable as that extended to any of his Co-Defendants. Yet that is what Petitioner suggests.

Petitioner's maximum sentence for Count 5 would have been twenty years. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(C). The maximum sentence for Count 10, if it were a tax evasion charge, would have been five years. *See* 26 U.S.C. § 7201. Putting aside, for the moment, any pertinent Guidelines calculations, Petitioner's maximum

sentence exposure under the plea offer would have been twenty-five years. Defendant Jacobs, an indisputably lesser but not insubstantial player in the charged conspiracy, was offered a plea to Counts "3 [and] 7." Count 3 was a drug sale charge, similar to Count 5. Jacobs' maximum sentence exposure with respect to Count 3 would also have been twenty years. Count 7 was a Section 371 charge for conspiracy to defraud the United States Government, relating to numerous underlying offenses. (*See* Gov't's Exs. 2-4.) The maximum sentence for Count 7 would have been five years. Thus, Jacobs' maximum sentence exposure under the plea offer would also have been twenty-five years. The Court finds it extremely unlikely that the two Defendants would have been offered, in essence, the same plea.

This presents a troubling issue. Indeed, there is little compelling evidence supporting *any* precise definition as to the nature of the second count. The plea offer was extended over 15 years ago, its terms incorporate a non-existent document, and the recollections of the individuals involved are hazy, at best. That the determination may be difficult, however, does not require the Court to abdicate its duty to decide the merits of Petitioner's application. The Court reaches a conclusion based upon a preponderance of the evidence standard, mindful that the burden of proof rests with Petitioner. *See Glick v. U.S.*, No. 97-CV-3905, 1998 WL 315065 at *5 (E.D.N.Y. June 11, 1998) ("It has long been established that the movant in a Section 2255 proceeding bears the burden of proof of establishing by a preponderance of the evidence that he is entitled to relief.")

After probing the Record, the Court finds that the second count offered to Petitioner referred to a money laundering charge. In reaching this conclusion, the Court primarily relies upon two facts. First, the apparent strength of the Government's money laundering case renders it unlikely that Petitioner would have been offered such a favorable second count. (Tr. at 84-85.) Second, the Court is persuaded by the logic inherent in AUSA Heller's testimony that, had the Government offered Petitioner a plea to charges that were contained in the then-existing indictment, such as Section 371 conspiracy or tax evasion, then the Government would have simply referred to those charges specifically in the Plea Letter. (*see* Tr. at 69, 75.) There would have been no need for any restrictions or caveats. The only charge that would have made any sense was a money laundering charge.

2. ***Sentencing Disparity***

The Court now assesses the disparity between the maximum sentence pursuant to the terms of the Plea Letter and the sentence Petitioner actually received. *See Pham*, 317 F.3d at 182.

As explained above, the maximum sentence for Count 5 would have been twenty years. *See* 21 U.S.C. § 841(b)(1)(C). The maximum sentence for the money laundering count would also have been twenty years. *See* 26 U.S.C. § 7201. Thus, Petitioner's total sentence exposure under the plea offer would have been forty years. Petitioner's sentence exposure under the

Sentencing Guidelines, however, would have been substantially less.

The 1988 Federal Sentencing Guidelines would govern Petitioner's sentencing under both counts. With respect to Count 5, Petitioner's total offense level would have been 20, providing for a sentence between 51 and 63 months. This calculation is based on Petitioner's criminal history category of IV, his role as orchestrator (R. at 327-61), the quantity of cocaine involved (Tr. at 295), and Petitioner's acceptance of responsibility pursuant to the plea.

Petitioner's total offense level for the money laundering charge would have been 30, corresponding to a sentence of anywhere between 135 and 168 months. This figure is arrived at by consulting the Petitioner's pre-sentence report ("PSR"). The PSR indicates two separate offense levels for the separate money laundering counts: level 30 for the violation of 18 U.S.C. § 1956(a)(1)(B)(ii) (knowing participation in a financial transaction designed "to avoid a transaction reporting requirement under state or federal law"); and level 32 for the violation of 18 U.S.C. § 1956(a)(1)(B)(i) (knowing participation in a financial transaction designed to conceal the proceeds of specified unlawful activity). As Petitioner has failed to affirmatively demonstrate which money laundering account was applicable, the Court utilizes the higher of the two ranges, and reduces that amount by 2, due to Petitioner's "would be" acceptance of responsibility.

*Appendix C*

Presuming consecutive sentences under each Count, Petitioner's maximum sentence under the global plea offer would have been 231 months, or 19 and 1/4 years. This figure, for the purpose of prejudice analysis, is appropriately compared to the sentence Petitioner received from Judge Platt—35 years imprisonment. *See Pham*, 317 F.3d 182-83 (comparing the "high end of the government's plea offer" with the defendant's "sentence after a trial conviction").

There is no magic formula to use in determining whether a disparity between sentences is "significant." Indeed, for a purportedly objective criteria, the term is seemingly prone to subjective assessment. In *Pham*, the Second Circuit found a significant disparity where the plea offer was for 78-97 months and the sentence received after trial was "210 months, which [was] more than double." 317 F.3d at 183. "More than double," however, is not required. *See U.S. v. Gordon*, 156 F.3d 376, 378, 381 (2d Cir.1998) (finding significant disparity where attorney rendered errant advice as to sentence exposure of 120 months, and sentence after conviction was 210 months).

Here, the Court finds the fifteen year disparity between the two sentences to be significant. The actual sentence was almost double the maximum under the plea offer. In light of Petitioner's age (twenty-four years old) at the time the offer was extended, the difference between a sentence of nineteen and thirty-five years is, undoubtedly substantial. (Tr. at 324.)

The determination of a significant disparity, however, carries little objective weight where, as here, other objective facts indicate that the defendant would never have been capable of actually accepting the plea. *Cf. Perez Gomez*, 2003 WL 22119123 at *6 (finding that other factors, including defendant's protestations of innocence, "significantly outweigh[ed] the sentencing disparity and demonstrat[ed] the lack of 'objective evidence that [defendant] would have accepted the plea agreement").

### 3. *The Global Plea Offer*

At the Hearing, the Court heard testimony that certain of Petitioner's Co-Defendants, Jacobs and Jenkins, were inclined to accept a plea. (Tr. at 70) There was also testimony concerning Co-Defendants Kearney and Celifie, indicating that the two were not interested in accepting a plea. (*Id.*) The Government argues that Petitioner's failure to proffer evidence indicating that each of the Co-Defendants would have accepted the global plea offer is fatal to his prejudice claim. The Court agrees.

The nature of a global plea is that it must be accepted by all defendants, or it cannot be accepted by any. Thus, Petitioner's averments that he would have accepted the plea offer only carry him so far. Where the plea offer is global, a defendant asserting prejudice from counsel's deficient representation with respect to the plea offer must either introduce objective facts indicating that the other co-defendants were inclined to accept the offer, or that offer was not truly global. *See Pham*, 317 F.3d at

184 (recognizing that the potential unwillingness of co-defendants to accept a global plea is not probative where the "government did not enforce the 'global' provision of its offer"). In other words, a defendant must establish that all that essentially remained was his willingness to accept. Otherwise, it cannot be said that there was a "reasonable probability" that counsel's failure to convey the offer would have changed the outcome. *See Strickland*, 446 U.S. at 694.

The instant case presents the clearest example of why this must be the rule. At the Hearing, Ronald Rubinstein testified concerning his representation of Defendant Jacobs in the Mickens case. (Tr. at 33-35.) Rubinstein testified that Jacobs was interested in accepting a plea offer, and would have been interested in accepting the offer contained in the Plea Letter, but was unable to do so because not everyone was "on board" with accepting the global plea. (Tr. at 35, 42-44, Gov't's Ex. 9.)[7] If it were simply a matter of Jacobs' desire to accept the offer, he could have taken advantage of the terms contained in the Plea Letter or negotiated some other settlement. Instead, Jacobs was denied the benefit of any plea offer, and later pled guilty to all charges against him in the Superseding Indictment. (Tr. at 44-46.)

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7. There is a typographical error on page 35 of the Court's copy of the transcript of the proceeding. While the transcript indicates that Rubinstein testified that everyone "was on board" with the global plea, it is apparent form the Court's contemporaneous record taking from the Hearing, and the context of Rubinstein's statement that the transcript should read that everyone "was not on board" with the global plea.

*Appendix C*

While Jacobs' efforts to accept the Plea Letter offer were obviously frustrated by Petitioner's failure to receive notice of the proposed deal, there were other Co-Defendants who, apparently, were not interested in accepting a plea. The Court heard testimony that the Government sought pleas from both Defendant Celifie and Defendant Kearney, but that neither was interested. (Tr. at 70.) Additionally, Defendant Young was tried and acquitted of all charges.

Petitioner cites no objective facts indicating that these Defendants (Kearney, Celifie, Young) were inclined to accept the Plea Letter offer. Petitioner's averment that he would likely have been able to get the remaining Co-Defendants to accept the offer is self-serving, (Tr. at 326; *but see* Tr. at 302), and is belied by his continuous protestations that he wished to take on all criminal responsibility to save his friends. (Tr. at 213, 314-15, 336.) Further, Petitioner's assertion that Simels' failure to inform him of the offer precluded any assessment of whether all Co-Defendants would accept the offer, (Tr. at 326), is countenanced by his ability to proffer sufficient objective facts concerning the desire of Jacobs and Jenkins to accept the offer.

Nor does Petitioner proffer any evidence indicating that the Government would not enforce the global aspect of the offer. *See Pham*, 317 F.3d at 184. To the contrary, based on the experiences of Defendants Jacobs and Jenkins, it is apparent that the Government intended to enforce the global plea by its terms.

*Appendix C*

Because of the global nature of the plea offer and the apparent disposition of certain of Petitioner's Co-Defendants to proceed to trial, the Court finds that Petitioner has failed to prove that he would have been able to accept the plea offer contained in the Plea Letter. Such finding is fatal to Petitioner's claims of prejudice, and requires denial of his Rule 60(b) motion.[8]

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8. Because the Court concludes that Plaintiff has failed to demonstrate that, even if he wanted to, he would have been able to accept the plea offer, the Court need not pass on the merits of the Government's remaining objections.

The Court notes, however, that there is ample reason to question the credibility of Petitioner's insistence that he would have accepted the terms of the Plea Letter if they were made known to him. First, Petitioner testified that he would have accepted a plea of even thirty-five years—the duration of the sentence he received after trial. The Court finds it difficult to understand why a defendant in Petitioner's situation, with the benefit of knowing the actual sentence that he would have received after an unfavorable trial, would accept a plea to that sentence and forego a chance at acquittal. Second, Petitioner's proffered motivation for accepting a plea—a desire to martyr himself for the sake of his friends—would have been undermined by the very acceptance of the global plea offer. Pursuant to the terms of the global plea, all Defendants, including those Petitioner wished to protect, would be required to admit to criminal charges and face prison time.

*Appendix C*

## CONCLUSION

For the reasons set forth above, Petitioner's motion pursuant to Rule 60(b) for relief from Judge Platt's Order denying his application pursuant to 28 U.S.C. § 2255 is DENIED.

Dated: Central Islip, New York
August 28, 2006

SO ORDERED

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.